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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 94

FRANK BONETTI, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General of the United States, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 36-38) is reported in 240 F. 2d 624.

JURISDICTION

The jurisdiction of the Court rests on 28 U. S. Code, sec. 1254(1). The judgment of the Court of Appeals was issued on December 27, 1956 (R. 39). Petition

for certiorari was filed on March 25, 1957. Certiorari was granted on December 16, 1957 (R. 40).

STATUTES INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, amended sections 1 and 4 of the Act of October 16, 1918, to provide in part as follows:

> "That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or many hereafter adopt . . .
>
> * * * * *
>
> "Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided for in the Immigration Act of February 5, 1917. The provisions of this sec-

tion shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

These provisions were repealed by section 403(a). (16) of the Immigration and Nationality Act of June 27, 1952, 166 Stat. 163, 279, but were kept applicable to pending proceedings by section 405(a) of that Act, 66 Stat. 280.

Section 241(a) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. Code 1251(a), provides in part:

"Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any geographical or political subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such organization or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided,* That nothing in this paragraph, or in

any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means. . . :"

Section 101(a)(13) of the Immigration and Nationality Act, 66 Stat. 166 and 167, 8 U. S. Code 1101 (a) (13), provides:

"Section 101. (a) As used in this Act—

* * * * *

(13) The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

QUESTIONS PRESENTED

1. Whether the statutory provision for deportation of aliens who become members of the Communist Party after "entering" the United States applies to the petitioner, who entered the country for the first time in 1923, was a member of the Communist Party from 1932 to 1936, left the country in 1937 giving up his residence and all rights to return, and entered the country again as a new immigrant in 1938, at which time after

a hearing in which he acknowledged his past membership in the Communist Party, he was adjudicated admissible and admitted for permanent residence and has not since been a member of the Communist Party.

2. Whether deportation under the above circumstances and on a record which used against the petitioner the testimony he gave at the hearing at which he was adjudicated admissible, violates due process of law.

3. Whether the statute providing for the deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case.

STATEMENT OF THE CASE

Petitioner is an alien who was born in France of Italian parentage. On November 1, 1923, aged 15, he was admitted to the United States for permanent residence. In 1932 he joined the Communist Party in this country and remained a member until about the spring of 1936 when he dropped out of the organization.[1] (R. 7-8, 12-13, 15, 22-23.) He understood the principles of Communism to be belief in the public ownership of the means of production and did not believe that the Communist Party stood for the forceful overthrow of the American government (R. 23, 27-29).

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[1] On one occasion petitioner placed the date of his leaving the Party as the spring of 1937 or a few months before he left for Spain on June 28, 1937 (R. 35). However, his other testimony indicated that he had left the Party in 1936 (R. 22-23, 28), and the Immigration Service found that he had been a member from 1932 to 1936 (R. 13, 15).

On June 28, 1937, petitioner left the United States in order to fight with the Spanish Republican army (R. 12, 24-25, 33-34). He did so because he felt that Franco was a tool of Mussolini and Hitler and that if the Rome-Berlin axis was not stopped in this aggression, "they would go on from country to country until the World War would start" (R. 24-25). Petitioner engaged in active combat in Spain and suffered the loss of a foot (R. 25).

On September 19, 1938, petitioner returned to the United States, applied for admission as an immigrant, and was detained at Ellis Island. A hearing on his admissibility was held by a Board of Special Inquiry, before which petitioner testified that he had been a member of the Communist Party and had fought in Spain. The Board of Special Inquiry ordered him excluded but was reversed on an administrative appeal, and on October 8, 1938, petitioner was again admitted to the United States for permanent residence as a quota immigrant. (R. 12-13; 20, 33-35; Exhs. 8, 9, 11, Tr. 103-119, 121.)[2] Petitioner has since then resided in the United States, leaving it only for a one-day visit to Mexico in the summer of 1939 (R. 13, 15, 30, 31). During his second period of residence in the United States he has never belonged to the Communist Party (R. 32).

In 1942, petitioner married a native-born American citizen (Exs. 13, 15, Tr. 124, 129). He obtained his first citizenship papers on June 1, 1940 (R. 12) and

[2] "Exh." refers to exhibits introduced at the deportation hearing, the record of which is part of the certified record in this Court. "Tr." refers to the transcript of the record of the deportation hearing.

filed a petition for naturalization on May 19, 1943 (R. 19).

In 1944, and again in 1946, he was interviewed in connection with his citizenship application by officials of the Immigration and Naturalization Service and again testified fully to his membership in the Communist Party during the period of 1932 to 1936 (R. 19-32). His application was not further processed.

On September 23, 1950, Congress enacted over the President's veto the Internal Security Act of 1950. Section 22 of that Act amended the Immigration Act of October 16, 1918, to provide for the expulsion of "any alien who was at the time of entering the United States, or has been at any time thereafter," a member of the Communist Party of the United States (*supra*, p. 2).

Deportation proceedings were instituted against petitioner in October 1951 (Ex. 1). Petitioner was ordered deported under the cited provision of the Internal Security Act, and the deportation order was sustained by the Board of Immigration Appeals (R. 14-15).[3] The evidence of past Communist Party mem-

[3] Sec. 22 of the Internal Security Act has been repealed by the Immigration and Nationality Act, but is kept applicable to pre-existing proceedings by the savings clause of the latter Act. Hence section 22 is the provision applicable to petitioner's case. Section 241 of the Immigration and Nationality Act carried forward the relevant substance of section 22 by providing for expulsion of any alien who has been after entry a member of the Communist Party of the United States. See *supra* p. 3. The court below treated the case as though the Immigration and Nationality Act provision were the one involved (R. 37, 38). This is a technical inaccuracy of no apparent significance. We believe that the question of construction and its answer are the same for both section 22 and section 241.

bership on which the administrative findings were based consisted of petitioner's testimony at the 1938 exclusion hearing before the Board of Special Inquiry, his admission of such membership in his alien registration form, and his statements in the 1944 and 1946 interviews on his application for naturalization (R. 11-12).

Petitioner brought suit against the Attorney General and the Commissioner of Immigration and Naturalization in the United States District Court for the District of Columbia to set aside the deportation order (R. 2-4). The District Court granted the Attorney General's motion for summary judgment on a record consisting of the complaint, answer and the record of the Immigration and Naturalization Service (R. 7-10). The court below affirmed (R. 36-39).

SUMMARY OF ARGUMENT

I

A. The deportation statutes provide for the expulsion of any alien who was a member of the Communist Party at the time of or after entry. Petitioner entered the country on three different occasions, in 1923, 1938 and 1939, respectively. He was not a member of the Communist Party at the time of any of these entries. He was a member after his first entry, but not after the second or third. The question, therefore, is which of his three entries is the relevant one for the purpose of the deportation statutes.

The court below thought that the problem was solved against petitioner by the fact that "entry" is defined, both by the cases and the Immigration and Nationality Act, as "any coming of an alien from a foreign place"

(subject to certain exceptions). This is a non-sequitur. The case and statutory definition of "entry" is meant merely to describe what kind of an arrival constitutes an "entry." It has no bearing on which of several entries is the critical one for determining an alien's status under other statutory provisions.

B. It is a general principle of both present and preceding immigration statutes that if an entering alien has satisfied the admission requirements, he is not thereafter expellable for causes, subsequently enacted, involving only pre-entry conduct or characteristics. The reason for this principle is that the admission of the alien represents a specific governmental determination that so far as his pre-entry conduct demonstrated he was a suitable person to reside in this country. To change this determination after the alien has rooted himself in our society would be an act of governmental bad faith.

It is also a settled principle that a determination of suitability is made with each entry made by the alien. A resident alien returning from a trip abroad to resume his residence is, for the purposes of the immigration laws, a newcomer.

Since a lawful entry is an insulation against expulsion for pre-entry conduct because it is a determination that such conduct was not disqualifying, and since each entry is such a determination, it follows that the latest entry supplies the applicable insulation. Hence, in order to be consistent with the scheme of our deportation laws, the provisions expelling for membership after entry should be interpreted to mean after the last entry. In the one instance in which Congress desired to depart from this scheme, it specifically used the words "after any entry."

The construction of the statutes to refer only to membership after the last entry is also supported by the principles that expulsion legislation will be interpreted favorably to the alien and that statutes should be construed to avoid serious constitutional questions and arbitrary and unreasonable results.

II

The statute expelling aliens for past membership in the Communist Party is unconstitutional on its face for the reasons stated in the briefs for petitioner in No. 5 this Term, *Rowoldt* v. *Perfetto*, 355 U.S. 115.

The application of the statute in this case imports new constitutional defects. It is a breach of governmental faith to expel petitioner, years after he was admitted to this country and settled here, for a cause which he divulged on seeking entry and which was held not to make him an undesirable person for residence. The breach of faith is magnified by the fact that the deportation order is based on testimony given by petitioner in his pre-entry proceeding and in his interviews on his naturalization petition. The disruption of the life of petitioner and his family on these facts is arbitrary, shocks the conscience, and thereby violates due process.

ARGUMENT

I. PETITIONER IS NOT DEPORTABLE BECAUSE HE WAS NOT A MEMBER OF THE COMMUNIST PARTY AT OR AFTER HIS SECOND AND THIRD ENTRIES. UNDER THE STATUTES PROPERLY CONSTRUED, PETITIONER'S STATUS MUST BE DETERMINED BY REFERENCE TO HIS LAST ENTRY, NOT THE FIRST.

A. The Definition of "Entry," Relied on Below, Is Irrelevant, Since the Issue Is Not the Meaning of "Entry," But Which of Several Entries Is the Critical One

The statute under which petitioner was ordered deported—section 22 of the Internal Security Act, amending the Act of October 16, 1918—provides for the expulsion of any alien who "at the time of entering the United States, or . . . at any time thereafter" was a member of the Communist Party. Similarly, section 241 of the current Immigration and Nationality Act, which the court below inaccurately applied (*supra*, p. 7, ftn. 3), provides for the expulsion of any alien who "is or at any time has been, after entry" a member of the Communist Party. Neither statute provides for the expulsion of an alien merely because he was a member of the Communist Party *before* he entered the United States.[4]

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[4] The current Act, like preceding immigration legislation, provides for expulsion of any alien who was excludable by the law existing at the time of his entry. Sec. 241(a)(1) of the Immigration and Nationality Act, *supra*; sec. 19(a) of the Immigration Act of Feb. 5, 1917, as amended, 39 Stat. 889, 54 Stat. 671, 8 U. S. C. (1940 ed.) 155. Since the amendment made by the Alien Registration Act of June 28, 1940, 54 Stat. 673, 8 U. S. C. (1940 ed.) 137, the immigration statutes have excluded aliens who ever were members of an organization advocating violent overthrow of the United States government. Since 1950 (*supra*, p. 2), they have excluded aliens who ever were members of the Communist Party. Prior to June 28, 1940, the comparable legislation excluded only aliens who were members of a proscribed organization at the time

In the present case, petitioner entered the country on three different occasions, in 1923, 1938 and 1939, respectively. He was not a member of the Communist Party "at the time" of any of these entries. He was a member of the Communist Party after his first entry, but he was not a member after his second or third entries. The question, therefore, is which of his three entries is the relevant one in the statutes providing expulsion for Party membership after entry. If the first entry is included in the statutes, petitioner is deportable. Otherwise he is not.

As we later show, there are compelling reasons for construing the statutes to refer only to membership after the last of several entries. Before examining these, however, it is desirable to eliminate a source of confusion which has bedeviled the problem of construction in two Courts of Appeals.

The court below, and before it the Second Circuit in *United States ex rel. Belfrage* v. *Kenton*, 224 F. 2d 803, thought that the solution to the problem was the meaning of the word "entry." As these two courts found, subject to limited exceptions "entry" is defined by both the cases and section 101(a)(13) of the Immigration and Nationality Act, *supra*, p. 4, as "any

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of their entry. Sec. 1, Act of Oct. 16, 1918, 40 Stat. 1012, amended by Act of June 5, 1920, 41 Stat. 1008. Accordingly, aliens who have entered since 1940 are subject to expulsion for having been before entry members of an organization advocating violent overthrow or, if they entered since 1950, for having been before entry members of the Communist Party. Since petitioner's last entry was in 1939, and since at the time of none of his entries was he a member of a proscribed organization, petitioner was not excludable by the law existing at the time of any of his entries, and hence he is not expellable on such a ground.

coming of an alien from a foreign place." They concluded, therefore, that the provision expelling aliens for Communist membership "after entry" meant after *any* entry.

This is clearly a non sequitur, somewhat comparable to trying to learn the result of a race by consulting a dictionary for the definition of "horse." A reading of the definition of "entry" in section 101(a)(13) of the Immigration and Nationality Act shows that all it does is to describe *what kind of arrival* constitutes an "entry." It does not determine which of several "entries" is the key to determining status under other provisions of the Act. The phrase "any coming" is used in the section *qualitatively*, as meaning a coming *of any kind* (subject to certain exceptions), as whether for permanent residence, as a visitor, as a seaman, in transit, or as a stowaway. It is a distortion to treat a definition of the *kind of coming* as dispositive of *which particular coming* is referred to by other sections. The fact that an "entry" is "any coming" does not mean that every statutory reference to "entry" means "any entry." When Congress meant "any entry," it felt compelled to say so expressly (*infra*, pp. 17-18).

The case definition of "entry," from which the statutory definition derives, is irrelevant for the same reason. In immigration law, "entry" has "a special technical meaning." *Barber* v. *Gonzales*, 347 U. S. 637, 641; *Mangoang* v. *Boyd*, 205 F. 2d 553, 557. It was, therefore, natural that the codification of immigration law should spell out the meaning of the term. But this technical meaning was spelled out in litigation which

centered about the question of what kind of arrival constitutes an "entry."[5]

The court below relied (R. 38) on the statement in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425, that the word "entry" "includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." But granted that a first coming is an entry, it does not follow that the first of several entries is the critical one.[6]

In short, all that the statutory and judicial definition of "entry" proves is that petitioner's coming into the country in 1932 was *an entry*. This we do not

[5] E.g., *U. S. ex rel. Claussen* v. *Day*, 279 U. S. 398, and *U.S. ex rel. Stapf* v. *Corsi*, 287 U. S. 129, decided that a resident alien who shipped out as a sailor made an "entry" on returning from a foreign port, although there would have been no "entry" if the voyage had been between United States ports. *Barber* v. *Gonzales*, 347 U. S. 627, held that a coming from an American possession was not an "entry." *Delgadillo* v. *Carmichael*, 332 U. S. 388, and *DiPasquale* v. *Karnuth*, 158 F. 2d 878, held that certain comings from foreign places were not "entries" because the departures were unintentional and unforeseen. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, held that the return of a resident alien from a brief visit abroad is an "entry." *Mangoang* v. *Boyd*, 205 F. 2d 553, cert. den. 346 U. S. 876, held that a coming by one who was not an alien at the time of arrival was not an "entry."

[6] It is true that there is visible in the *Volpe* opinion some of the same confusion shown below in regarding the qualitative meaning of entry as having a bearing on which of several entries is critical. This arose out of the fact that the argument of the petitioner in *Volpe* seems to have been pitched on the premise that a resident alien's return from a brief visit was not actually an entry. The petitioner in *Volpe* apparently did not dispute that if this return was an entry, it, not the first entry, was determinative of petitioner's status. The actual holding in *Volpe* made the last entry the critical one, and is thus in accord with our views.

dispute. But it does not resolve the problem here, which is whether it was *the entry* upon which petitioner's status depends.

B. Petitioner's Last Entry Is the Critical One for Determining His Status

In our view, the provisions of both the Internal Security Act and the Immigration and Nationality Act expelling aliens for Communist Party membership after entry refer to membership after the alien's last entry. This construction follows from the scheme and theory of the deportation legislation and from standard canons of construction. Under it, petitioner is not deportable.

1. It is a general principle of both the present and preceding immigration statutes[7] that once an immigrant has satisfied the admission requirements, he is not thereafter expellable for *pre-entry* conduct or characteristics. From time to time Congress enacts new causes for expulsion to have retroactive effect. The general rule, however, is that the newly-enacted causes do not relate to pre-entry conduct or character. Like the statutory provisions specifically involved in this case, they are by their terms limited to characteristics existing "at or after entry." Similarly, aliens who were excludable by the law at the time of their entry are expellable; they are not expelled for pre-entry conduct which would have excluded them under exclu-

[7] The discussion in this paragraph relates to the general expulsion sections of both the current legislation and the preceding basic immigration law. Sec. 241(a) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. 1251(a); and sec. 19(a) of the Immigration Act of Feb. 5, 1917, as amended, 39 Stat. 889, 54 Stat. 671, 8 U. S. C. (1940 ed.) 155.

sionary rules enacted after entry. (See *supra*, p. 11, ftn. 4.)

There is obvious reason for this principle that an entry in satisfaction of existing exclusionary laws insulates the alien from expulsion for newly-enacted causes relating to pre-entry character. The admission of the alien represented a specific governmental determination that so far as his pre-existing conduct demonstrated he was a suitable person to reside in this country. To change this determination after the alien has rooted himself in our society would be an act of governmental bad faith.[8] As pointed out in *Berrebi* v. *Crossman*, 208 F. 2d 498, 499: "Even though the past misconduct of an alien might have justified his exclusion at the time of his application for admission, the fact that he was lawfully admitted and lived a law abiding life in this country thereafter, brings him within the different classification provided by law for an alien sought to be deported."

It is also established, however, that a determination of suitability is made with each entry made by the alien. A resident alien who leaves the country even if for only a day is; for the purposes of the immigration laws, a newcomer on his return. He is subject to all current exclusionary rules, and if he enters though then excludable, he is expellable, even though he would not have been subject to deportation if he had not

[8] Of course this insulation is not available if the alien entered without inspection or concealed his being in an excludable class. Such frustrations of the exclusion laws are taken care of by the fact that aliens who enter without inspection or who were in an excludable class at the time of entry, are expellable. Cf. sec. 241(a)(1) and (2) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. 1251(a)(1) and (2).

stepped across the border. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206; *Chae Chan Ping* v. *United States (The Chinese Exclusion Case)*, 130 U. S. 581; *Lewis* v. *Frick*, 233 U. S. 291; *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422; *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129; *Lapina* v. *Williams*, 232 U.S. 78; *United States ex rel. Claussen* v. *Day*, 279 U. S. 398.

Since a lawful entry is an insulation against expulsion for pre-entry conduct because it is a determination that such conduct was not disqualifying, and since each entry is such a determination, it follows that the latest entry supplies the applicable insulation. Consistent with this scheme and theory of the immigration laws, expulsion for characteristics existing "at or after entry" must be taken to mean "at or after the last entry." And in fact, in applying the deportation statutes, the cases (last cited) have uniformly treated the last entry or proposed entry as the critical one for determining the alien's status.

In the cited cases, the alien was worse off by reason of this fact. But since the theory of the cases is that the re-entering alien is a newcomer, the same principle making the last entry determinative should apply even in the unusual case where, as here, the alien may thereby be better off.

When Congress wanted to depart from this general scheme making the last entry determinative, it specifically so provided. Only one category, subdivision (13) of section 241(a) of the Immigration and Nationality Act, provides for the expulsion of lawfully admitted aliens for a subsequently enacted cause relating to pre-entry conduct. And in this category,

Congress provided for the deportation of any alien who "prior to, or at the time of *any* entry or at any time within five years after *any* entry, shall have knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." Thus Congress did distinguish between "after entry" and "after any entry." The fair inference is that where Congress merely said "entry," it meant only the last entry, or at least the last entry for permanent residence, in accordance with the established principle that a reentering alien is a newcomer. "When Congress has the will it has no difficulty in expressing it. . . . When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U. S. 81, 83.

Nor would this construction enable evasion of the immigration laws by an alien's crossing the border and returning. For if at the time of his return he is within a then excludable class, he will be excluded or, if he nevertheless enters, will be expellable.

2. The interpretation urged by the government would make aliens deportable for Communist Party membership at or after any entry. This obviously is less favorable to aliens than the construction we urge. Since there is at least an ambiguity and the legislative history is not illuminating, our view is supported by the principle that deportation laws should be construed in favor of the alien. *Barber* v. *Gonzales*, 347 U. S. 637; *Delgadillo* v. *Carmichael*, 332 U. S. 388. In *Tan* v. *Phelan*, 333 U. S. 6, 10, the Court stated:

> "We resolve the doubts in favor of that construction because deportation is a drastic meas-

> ure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

In addition, the interpretation applied below should be rejected in order to avoid serious constitutional questions (cf. *United States* v. *C.I.O.*, 335 U. S. 106) and arbitrary and unreasonable results (cf. *United States* v. *American Trucking Association*, 310 U. S. 534).

II. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

In No. 5 this Term, *Rowoldt* v. *Perfetto*, 335 U. S. 115, counsel for the present petitioner briefed and argued the unconstitutionality of the legislation requiring deportation of aliens for past membership in the Communist Party. We will not again brief the subject, but if the Court reaches constitutionality, we submit that it should overrule *Galvan* v. *Press*, 347 U. S. 522, and hold the legislation unconstitutional on its face for the reasons stated in our briefs in *Rowoldt*.

The application of the statute in this case imports new constitutional defects. Surely it is a breach of governmental faith to expel an alien for a cause which he divulged on seeking entry and which was held not to exclude him. With full knowledge of petitioner's former connection with the Communist Party, the government decided that he was fit to reside in this coun-

try. That decision caused him to shape his life, take an American spouse, and otherwise fix his roots here. It outrages all feeling that petitioner should now be told that the cause which did not disqualify him from entering and residing here has years later become a reason for disrupting his life and that of his family.

The breach of faith is magnified by the fact that the deportation order is based in part upon the testimony given by petitioner in his entry proceeding. The stale justification that aliens have only themselves to blame for harsh expulsions because they did not become citizens, disappears in the light of the government's failure to process petitioner's citizenship application and the fact that the information he gave to the naturalization examiners also became evidence against him.

Expulsion of petitioner on these facts violates due process because it "shocks the conscience" and "offends the community's sense of fair play and decency." *Rochin* v. *California*, 342 U. S. 165, 173.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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